NETWORK PET PRODUCTS (M) SDN BHD v. ROYAL CANIN SAS & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02(NCC)-1454-06-2013]
13 JANUARY 2015

CONTRACT: *Termination – Notice – Adequacy – Non-renewal of distributorship agreement – Commercial relationship of 15 years – Nine months' notice of termination – Whether reasonable – Whether injury caused*

CONTRACT: *Oral agreement – Existence of oral agreement – Oral agreement of partnership – Whether proven – Commercial relationship of 15 years – Whether characterised as agency simpliciter or de facto partnership – Whether allegation of tort of conspiracy to injure and inducing breach of contract proven*

TORT: *Passing off – Elements of passing off – Whether established – Whether mark used to create confusion in market – Whether damage to goodwill and reputation proven – Whether identification of mark was throughout with proprietor – Whether proprietor acquiesced use of mark*

The appellant, Network Pet Products (M) Sdn Bhd ('NPP'), was appointed by the first respondent, Royal Canin SAS ('RCSA'), a company incorporated in France, as the exclusive distributor of RCSA's pet food products for Malaysia and Brunei. Royal Canin Malaysia Sdn Bhd ('RCM'), the second defendant, was the locally-incorporated company of RCSA. The appeal herein concerned termination of the 15 years' commercial relationship. There was initially no written contract entered into and the informal business relationship lasted from 1996 to 2003. In 2003, a written contract of distributorship was entered into between RCSA and NPP. The written contract was initially for a duration of two years and made renewable for a period of one year each, subject to the approval of RCSA and the fulfilment of minimum sales target for each year to be agreed between the parties. The contract was renewed yearly and business plans and sales target were set for the years 2004 to 2007. However, there were no formal renewals of the contract for 2008 to 2011 until the notice of termination on 21 October 2011. NPP claimed that from 2008 onwards NPP and RCSA operated as a *de facto* partnership, brought about by a discussion between their representatives and the parties had thereafter conducted their relationship without adhering to the terms of the earlier written contract on the requirements of business plans and yearly minimum sales target. NPP based its claim against RCSA and RCM on the breach of the alleged oral partnership and contended that the nine months' notice for the termination was inadequate. NPP thus claimed for damages for 'conspiracy to injure' and 'inducing breach of contract and unlawful interference' with NPP's business. The High Court dismissed NPP's

claim against both RCSA and RCM. On the other hand, the High Court allowed RCSA's counterclaim against NPP and awarded damages for the tort of passing off in respect of an alleged unauthorised use of the Royal Canin mark in a Facebook page opened by NPP which led to confusion to customers of RCSA. The issue in the appeal was whether there was an oral partnership agreement.

Held (allowing appeal in part; affirming decision of High Court and setting aside orders against counterclaim)
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) In assessing whether a partnership exists, the court has to consider the intention of the parties, and in the absence of a written agreement, reliance has to be placed on the provisions of the Partnership Act 1961. The attempt to prop up an oral partnership agreement flew in the face of the clear provision of Article XV of the Distributorship Contract which constituted an 'entire agreement clause'. (para 26)

(2) It was important to prove that the 'predominant purpose' was to injure NPP and injury was thereby caused. On the facts, it could not be said that there was such a 'predominant purpose'. The non-renewal of the distributorship was within the discretion of RCSA and reasonable notice was given. The period of nine months' notice was reasonable, since the concern of NPP appeared in part to be the expenditure incurred in renting the warehouse. (para 26)

(3) The penultimate burden of proof on the standard of balance of probabilities lay with NPP to prove the existence of the alleged oral partnership agreement. Based on s. 114(g) of the Evidence Act 1950, there must be evidence of a conscious 'withholding' of evidence. NPP had failed to discharge the burden. Once NPP failed to substantiate the existence of the alleged oral agreement of partnership, the claims for conspiracy and unlawful interference with the contract consequentially could not stand. (paras 30 & 31)

(4) The essential ingredients of the tort of passing off had not been established by RCSA and RCM. The evidence did not support any inference that the mark 'Royal Canin' was being used to represent the mark as that of NPP to create confusion in the market, and RCSA had failed to adduce any evidence of the probability of damage to their goodwill and reputation. The identification of the mark was throughout with RCSA. The fact that RCSA knew of the Facebook page and took some time to protest was sufficient evidence of acquiescence on RCSA's part. (para 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, Network Pet Products (M) Sdn Bhd ('NPP'), dilantik oleh defendan pertama, Royal Canin SAS ('RCSA'), sebuah syarikat yang ditubuhkan di Perancis, sebagai pengedar eksklusif produk-produk makanan haiwan

peliharaan RCSA bagi Malaysia dan Brunei. Royal Canin Malaysia Sdn Bhd ('RCM'), defendan kedua, adalah syarikat tempatan RCSA. Rayuan di sini adalah berkaitan dengan penamatan hubungan komersial selama 15 tahun tersebut. Pada awalnya, tidak ada kontrak bertulis yang dimeterai dan hubungan perniagaan tidak rasmi tersebut bertahan dari tahun 1996 hingga 2003. Dalam tahun 2003, satu kontrak pengedaran bertulis dimeterai antara RCSA dan NPP. Kontrak bertulis tersebut pada asalnya adalah untuk tempoh dua tahun dan diperbaharui setiap tahun, tertakluk kepada kelulusan RCSA dan pematuhan kepada sasaran jualan bagi setiap tahun seperti yang dipersetujui antara pihak-pihak. Kontrak tersebut diperbaharui setiap tahun dan pelan perniagaan dan sasaran jualan ditetapkan bagi tahun-tahun 2004 hingga 2007. Walau bagaimanapun, tidak ada pembaharuan rasmi kontrak tersebut bagi tahun-tahun 2008 hingga 2011 sehingga notis penamatan pada 21 Oktober 2011. NPP menyatakan bahawa dari tahun 2008, NPP dan RCSA telah berurusan sebagai perkongsian *de facto*, melalui perbincangan antara wakil-wakil mereka dan pihak-pihak kemudiannya telah melaksanakan hubungan mereka tanpa pematuhan kepada terma-terma kontrak bertulis sebelumnya bagi keperluan pelan perniagaan dan sasaran jualan minimum tahunan. NPP mendasarkan tuntutannya terhadap RCSA dan RCM atas kemungkiran perjanjian perkongsian lisan dan menghujahkan bahawa notis sembilan bulan bagi penamatan adalah tidak mencukupi. NPP oleh itu menuntut ganti rugi bagi 'konspirasi terhadap kerugian' dan 'mendorong kemungkiran kontrak dan campur tangan salah' dengan perniagaan NPP. Mahkamah Tinggi menolak tuntutan NPP terhadap RCSA dan RCM. Sebaliknya, Mahkamah Tinggi membenarkan tuntutan balas RCSA terhadap NPP dan mengawardkan ganti rugi bagi tort kelirupaan berkaitan dengan penggunaan tanda Royal Canin tanpa kuasa di halaman Facebook yang dibuka oleh NPP yang menjurus kepada kekeliruan kepada pelanggan-pelanggan RCSA. Isu dalam rayuan ini adalah sama ada terdapat perjanjian perkongsian lisan.

Diputuskan (membenarkan sebahagian rayuan; mengesahkan keputusan Mahkamah Tinggi dan mengenepikan perintah terhadap tuntutan balas) Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Dalam menilai sama ada perkongsian wujud, mahkamah perlu mempertimbangkan niat pihak-pihak, dan dalam ketiadaan perjanjian bertulis, peruntukan Akta Perkongisan 1961 perlu dirujuk. Cubaan untuk bersandarkan atas perjanjian perkongsian lisan bertentangan dengan peruntukan jelas artikel XV Kontrak Pengedaran yang membentuk 'klausa perjanjian mutlak'.

(2) Adalah penting untuk membuktikan 'tujuan utama' adalah untuk mengakibatkan kerugian kepada NPP dan kerugian telah berlaku. Atas fakta, tidak boleh dikatakan bahawa terdapat 'tujuan utama' sedemikian. Kegagalan pembaharuan pengedaran tersebut adalah dalam budi bicara

RCSA dan notis yang munasabah telah diberikan. Tempoh notis sembilan bulan adalah munasabah, kerana apa yang dipentingkan oleh NPP sebahagiannya adalah perbelanjaan yang telah dibuat untuk menyewa gudang.

(3) Beban pembuktian pra-akhir atas standard imbangan kebarangkalian terletak atas NPP untuk membuktikan kewujudan perjanjian perkongsian lisan yang didakwa. Berdasarkan s. 114(g) Akta Keterangan 1950, perlu ada keterangan 'penahanan' keterangan dengan sengaja. NPP telah gagal melepaskan beban tersebut. Sebaik sahaja NPP gagal membuktikan kewujudan perjanjian perkongsian lisan yang didakwa, tuntutan terhadap konspirasi dan campur tangan salah dengan kontrak tidak boleh dikekalkan.

(4) Elemen-elemen utama tort kelirupaan tidak dibuktikan oleh RCSA dan RCM. Keterangan tidak menyokong apa-apa inferens bahawa tanda 'Royal Canin' digunakan untuk melambangkan sebagai milik NPP untuk mewujudkan kekeliruan dalam pasaran, dan RCSA telah gagal mengemukakan keterangan bagi kemungkinan kerugian kepada nama baik dan reputasi mereka. Pengenalpastian tanda tersebut adalah pada setiap masa dengan RCSA. Fakta bahawa RCSA mengetahui tentang halaman Facebook tersebut dan mengambil masa untuk membantah adalah bukti persetujuan oleh RCSA yang mencukupi.

Case(s) referred to:

Chua Ka Seng v. Boonchai Sompolpong [1993] 1 SLR 482 ***(refd)***
Kimbokaya Sdn Bhd v. Junior Apparel Enterprise Sdn Bhd [2011] 1 LNS 1463 HC ***(refd)***
Kuwait Oil Tanker Co SAK v. Al Bader [2000] 2 All ER (Comm) 271 ***(refd)***
Macronet Sdn Bhd v. RHB Bank Berhad [2002] 4 CLJ 729 HC ***(refd)***
Martin Mairin Idang v. Rakanan Jaya Sdn Bhd & Anor [2011] 1 LNS 535 HC ***(refd)***
Merbok Hilir Bhd v. Sheikh Khaled Jassem Mohammad Jassem Al-Thani & Other Appeals [2013] 8 CLJ 309 CA ***(refd)***
Nagase Singapore Pte Ltd v. Ching Kai Huat and Others [2008] 1 SLR 80 ***(refd)***
SBS Exporters Sdn Bhd & Anor v. Tampin Rubber Furniture Industry Sdn Bhd & Ors [2011] 10 CLJ 689 HC ***(refd)***
Sykt Jaya v. Star Publications (M) Bhd [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 30
Evidence Act 1950, ss. 101, 106, 114(g)
Partnership Act 1961, ss. 3(1), 4

For the appellant - Cyrus Das (M Nagarajah, Tanya Lopez & Daniella Zulkifli with him); M/s Shook Lin & Bok
For the respondent - Jack Yow; M/s Rahmat Lim & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: 22NCC-1038-07-2012]

Reported by S Barathi

JUDGMENT

Mohamad Ariff Yusof JCA:

Parties And Brief Background Facts

[1] This appeal concerned a termination of a commercial relationship that spanned a period of 15 years from 1996 until October 2011. In 1996, the appellant, Network Pet Products (M) Sdn Bhd ("NPP"), the plaintiff in the High Court, was appointed the exclusive distributor for Malaysia and Brunei by Royal Canin SAS ("RCSA"), the first defendant below and the first respondent in this appeal, of RCSA's pet food products. RCSA is a company incorporated in France. The second respondent and the second defendant below, Royal Canin Malaysia Sdn Bhd ("RCM"), is the locally incorporated company of RCSA, having been incorporated on 9 March 2012.

[2] The letter of termination sent by RCSA to NPP and signed by its President (Jean Christophe Falin) is dated 21 October 2011, and it reads:

> Re: Contract of Distributorship
>
> During the recent discussions between representatives of Royal Canin and yourself concerning the Contract of Distributorship dated 15th May 2003 ("Contract"), our representatives informed you that Royal Canin was not able to approve the renewal of the Contract for another 1 year term after 31st December 2011, when the current term expires.
>
> This letter is to provide NPP with formal notice that Royal Canin will not renew the Contract for another 1 year term after 31st December 2011.
>
> However, in view of the long, cooperative relationship between our two companies, and to assist NPP to manage this change in an optimal way, we are agreeable to the relationship continuing until 31st July 2012, thereby providing 9 months' notice to NPP. We look forward to working with you during that period ...

[3] Although a nine months' notice of termination was given, NPP pleaded that this letter was issued "in breach of the Terms of Partnership" (see para. [35] of the statement of claim).

[4] NPP based its claim against RCSA on a breach of an alleged oral partnership and maintained that the nine months' notice was an inadequate notice for the termination. As against RCSA and RCM, NPP claimed damages for "conspiracy to injure" and "inducing breach of contract and unlawful interference" with NPP's business.

[5] The business relationship began in 1996 when RCSA's representative in the Asia-Pacific region, Luc Cuinet, invited NPP, through its director and shareholder, Shanmuganathan ("PW1"), to be RCSA's exclusive distributor for Malaysia and Brunei. There was initially no written contract entered into, and this informal business relationship lasted from 1996 to 2003. In 2003, however, a written contract of distributorship was entered into between RCSA and NPP. This written contract was initially for a duration of two

years and made renewable for a period of one year each, subject to the approval of RCSA and the fulfilment of minimum sales target for each year to be agreed between the parties. The contract was renewed yearly and business plans and sales targets were set for the years 2004, 2005, 2006 and 2007. There were no formal renewals of the contract for 2008, 2009, 2010 and 2011, until the notice of termination was given on 21 October 2011.

[6] It was NPP's position that from 2008 onwards NPP and RCSA operated as a *de facto* partnership, which was brought about by a discussion between their representatives in January 2008. According to NPP, RCSA's representative in Malaysia, Philippe Estiot, had represented as such to NPP's representatives, and the parties had thereafter conducted their relationship without adhering to the terms of the earlier written contract on the requirements of business plans and yearly minimum sales target.

[7] With the termination of the relationship, RCSA's products were distributed by its own locally incorporated company ie, RCM.

The Pleaded Case And Reliefs

[8] As pleaded, the reliefs claimed, based allegedly on damages to NPP's business and reputation, were stated in the following manner in para. [58] of the statement of claim:

> 58. WHEREFORE, the plaintiff claims against the 1st and 2nd defendants as follows:
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> Against the 1st defendant:-
>
> (i) a declaration that as at 1.1.2008, the Plaintiff and the 1st defendant carried on business in partnership;
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> (ii) a declaration that the plaintiff is entitled to solely and exclusively distribute the Products in Malaysia and Brunei to the exclusion of the 1st defendant and/or any other 3rd party;
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> (iii) an order that the 1st defendant be restrained, whether by itself and/or by its directors and/or officers and/or employees and/or servants and/or agents or any of them howsoever from supplying, distributing, selling or offering for sale, pet food products bearing the "Royal Canin" trademark ("Products") in Malaysia and Brunei to anyone other than the plaintiff;
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> (iv) an order that the 1st defendant be restrained whether by itself, its directors and/or officers/employees and/or servants and/or agents and/or any of them howsoever from causing, enabling, facilitating, abetting or assisting anyone other than the plaintiff, to supply, distribute, sell or offer for sale the Products in Malaysia and Brunei;
>
> (v) an order that the 1st defendant be restrained, whether by itself and/or by its directors and/or officers and/or employees and/or servants and/or agents or any of them howsoever from contacting the plaintiff's existing customers, whether verbally, in writing or by any other means of communication;

(vi) an order that the 1st defendant be restrained whether by itself and/ or by its directors and/or officers and/or employees and/or servants and/or agents or any of them howsoever from inducing or procuring breaches or unlawfully interfering in contracts between the plaintiff and its clients and/or customers;

(vii) an order that the 1st defendant furnishes the plaintiff with an account of profits made by the 1st defendant from 1.1.2008 to date.

Against the 2nd defendant:

(viii) an order that the 2nd defendant be restrained, whether by itself and/or by its directors and/or officers and/or employees and/or servants and/or agents or any of them howsoever from supplying, distributing, selling or offering for sale the pet food products bearing the "Royal Canin" trademark ("Products") in Malaysia and Brunei to anyone other than the plaintiff;

(ix) an order that the 2nd defendant be restrained whether by itself, its directors and/or officers and/or employees and/or servants and/or agents and/or any of them howsoever from causing, enabling, facilitating, abetting or assisting anyone other than the plaintiff, to supply, distribute, sell or offer for sale the Products in Malaysia and Brunei;

(x) an order that the 2nd defendant be restrained, whether by itself and/or by its directors and/or officers and/or employees and/or servants and/or agents or any of them howsoever from contacting the plaintiff's existing customers, whether verbally, in writing or by any other means of communication;

(xi) an order that the 2nd defendant be restrained whether by itself and/ or by its directors and/or officers and/or employees and/or servants and/or agents or any of them howsoever from inducing or procuring breaches or unlawfully interfering in contracts between the plaintiff and its clients and/or customers and the 1st defendant;

(xii) an order that the 2nd defendant furnishes the plaintiff with an account of profits made by the 2nd defendant from 9.3.2012 to date ...

[9] The reliefs pleaded as quoted above were fundamentally anchored on the premise that a partnership had existed between NPP and RCSA since 1 January 2008, and that had allegedly been unlawfully terminated, hence the claim for an account of profits from the first defendant since 1 January 2008. The reliefs prayed against RCM, on the other hand, was related to the conspiracy to injure and wrongful interference with trade arguments. Thus, NPP pleaded that RCM furnish NPP with an account of profits made by it since RCM's date of incorporation, ie, 9 March 2012, in addition to restraining RCM from interfering with, or inducing the existing customers of NPP.

A **Decision Of The High Court**

[10] The High Court dismissed NPP's claim against both RCSA and RCM. The High Court also allowed a counterclaim by RCSA against NPP, awarding RM20,000 damages for the tort of passing off. This was in respect of an alleged unauthorised use of the Royal Canin mark in a Facebook page B opened by NPP which led to confusion to customers of RCSA. The High Court further directed that the Facebook account be deactivated.

Decision In This Appeal

[11] In this appeal, which was allowed in part, we dismissed NPP's appeal C and affirmed the judgment and orders of the High Court with respect to NPP's claim against RCSA and RCM, but allowed NPP's appeal in relation to the counterclaim and set aside the judgment and orders on the counterclaim. We therefore agreed with the findings and conclusions of the High Court on the main claim that NPP had failed to prove the existence of D the alleged oral partnership between NPP and RCSA on a balance of probabilities, and further failed to prove the alleged tort of conspiracy to injure and inducing breach of contract. We did not agree, however, with the findings and conclusion with regard to the counterclaim on passing off since the evidence disclosed RCSA was aware of the activation of the Facebook E account from the start and had allowed it to continue. In any event, the alleged confusion in the use of the Royal Canin mark simply did not exist. There was no confusion in the use of the mark in trade in the traditional sense of passing off. The mark was used as denoting products belonging to RCSA. There was no attempt to pass off RCSA products as NPP's products. In any event, by the time the case was heard and disposed, the offending Facebook F account had been deactivated.

Summary Of Grounds Of The High Court

[12] As appears in the judgment of the High Court, the learned High Court Judge referred to ss. 3(1) and 4 of the Partnership Act 1961, noted that a G partnership is defined as "the relationship which subsists between persons carrying on business in common with a view to profit" and that one of the *indicia* of partnership is the sharing of profits, and further that a court must look at the totality of the facts to determine the intentions of the parties whether a partnership was intended, finally decided that NPP had failed to H prove the relationship between NPP and RCSA was a partnership, stating that it was "nothing more than a union of commercial convenience within the parameters of the contracts of distributorship" (pp. 17-19 of the judgment). The High Court held:

> In the present case the Contract of Distributorship forms the basis of the I relationship between the plaintiff and the 1st defendant. Even after the expiry of the Contract Period (end of 2004) the parties continued with the terms as provided. In fact in 2008 and beyond that was the status of the

business relationship between the parties, not as partners but as manufacturer/supplier and a distributor. For a partnership to exist not only there must be a sharing of profits whether monetary or otherwise but the parties must be *ad idem* to create such a business union. In the instant case the relationships between the parties were nothing more than a union of mutual commercial convenience within the parameters of the terms of the contracts of distributorship. There is insufficient evidence to show that a partnership relationship was cemented between the parties ...

The plaintiff failed to adduce any evidence to show that there was direct or indirect interference coupled with unlawful means. In the tortious act of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiff ...

Applying the above principles where the act is lawful, the predominant purpose must be to cause loss to the plaintiff for there to be a conspiracy. If the predominant purpose is for the self-interest or protection of the Defendants, it is not an unlawful purpose and there is no conspiracy, even if the plaintiff incidentally suffers loss ...

[13] In allowing the counterclaim by RCSA, the High Court noted that the crux of the counterclaim was the unauthorised setting up of a Facebook account by NPP under the name of "Royal Canin Malaysia" without the consent of RCSA, and NPP continued to use this "trade style" even after the notice of non-renewal of the distributorship contract was sent. Finding all the three elements of passing off established (the existence of goodwill and reputation of RCSA, misrepresentation by NPP in the course of trade, and damage or likelihood of damage resulting from that misrepresentation), the High Court was satisfied that NPP had clearly misrepresented itself to be the first defendant by setting up the Facebook account under the trade style "Royal Canin Malaysia" without the consent or authorisation of RCSA, resulting in confusion to customers as evidenced by the comments posted on the Facebook. The High Court held:

Goodwill or reputation is an important pre-requisite to an action in passing off. The existence and extent of the plaintiff's reputation is a question of fact and the main consideration is the likelihood of confusion with consequential injury to the plaintiff. The evidence adduced show that the Facebook had created confusion to the customers. Through its products the 1st defendant has established itself in Malaysia and has sufficient goodwill and reputation ...

... a plaintiff in a passing off does not have to prove that it has suffered damage by way of loss of business or in any other way. It is sufficient if it resulted in damage to his trade or business including damage to his goodwill in respect of that trade or business ... The counterclaim is allowed and the plaintiff is ordered to immediately deactivate the Facebook account and paid to the 1st defendant RM20,000 as damages (at pp. 22 to 24, Judgment).

The Submissions In The Appeal

NPP's Arguments

[14] In this appeal, the submissions of the appellant may be summarised as follows:

(a) the learned trial judge failed to judicially appreciate that the relationship of the parties between 2008 until the date of the "abrupt" termination in October 2011 was a *de facto* partnership based on an oral agreement;

(b) while NPP had adduced sufficient *prima facie* evidence of the oral agreement reached in January 2008, by which the relationship was agreed to be a partnership, the learned trial judge misapplied the rules of evidence in ss. 114(g), 101 and 106 of the Evidence Act, in not finding that the evidential burden then shifted to the respondents to call the primary witness for them, Philippe Estiot, who was their representative who attended that meeting in January 2008 together with PW1 and PW2 (Shanmuganathan and Vanitha); instead, the trial judge drew an adverse inference against NPP for not calling Philippe Estiot who was after all an employee and representative of RCSA at the material time;

(c) the learned trial judge erred in law in Her Ladyship's assessment of the *indicia* of partnership under s. 4 of the Partnership Act and placed too much emphasis on the requirement of "sharing of profit";

(d) the learned trial judge failed to attach sufficient significance to other evidential factors which pointed to the existence of a *de facto* partnership;

(e) the learned trial judge failed to appreciate that the termination of the partnership was inherently unfair and oppressive, which ended a relationship lasting for 15 years during which NPP had built an extensive network of distribution and invested in infrastructure for that purpose; an expectation of fair treatment lay at the base of a long-standing agency relationship, whether characterised as an agency *simpliciter* or a *de facto* partnership, and compensation based on the value of the agency lost should have been awarded by the High Court to NPP;

(f) the learned trial judge failed to appreciate that the elements of the tort of conspiracy had been established with the establishment of RCM to take over NPP's position as exclusive distributor of the products, the "poaching" of one of NPP's employee (Joanne Wong), and attempted "poaching" of PW2 (Vanitha) and the conduct of RCM prior to the taking over of the exclusive distributorship business when it contacted NPP's customers;

(g) in relation to the counterclaim, RCSA had knowledge of the Facebook account as early as 2010 but decided to take an issue on this only shortly before RCM entered the market; there was therefore acquiescence by RCSA in the use of the Royal Canin name to promote the products; in any event, the Facebook account had been deactivated in August 2012.

[15] The thrust of the submissions was on the purported existence of the *de facto* partnership post-2008. We quote below that part of NPP's written submission bearing on this argument:

> The existence of a *de facto* partnership between two commercial parties on a common project is a question of mixed fact and law: See *Keith Spicer v. Mansell* (1970) 1 WLR 333 ... *Ram Avatar v. Ramjivan* AIR 1956 Hyd. 131 ...
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> It is not a pure question of fact, It may be proved by oral evidence ... It may be inferred from conduct and dealings: Firm *TK Somoyya v. CIT* AIR 1956 Hyd.87 ...
>
> The learned Judge erred in this regard in 2 respects. First, on the burden of proof and her treatment of how Sections 106 and 114(g) Evidence Act applies. Secondly, on the *indicia* of a partnership in law.
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> On the first point, the learned Judge came to the unjustifiable conclusion that it was for the Appellant's side to call the French representative at the meeting, Philippe Estiot, as a witness to prove that a *de facto* partnership was established in the discussions in January 20008. The learned Judge also concluded that it was for the Appellant to call the other Frenchman, Luc Cuinet, and on this combined failure drew the adverse inference under Section 114(g) against the Appellant's case ...
>
> This was a critical factor that led the learned Judge to hold that the Appellant had failed to prove the existence of an oral partnership. The learned Judge was wrong in law in her application of the burden of proof, and her failure to recognise that the onus of proof is a shifting onus, and that once a *prima facie* case is made out on a disputed event, the burden shifts to the side denying the event to call rebuttal evidence.
>
> There were only 3 people present at the meeting in January 2008 i.e. Philippe Estiot, PW1 and PW2. PW1 and PW2 confirmed that the meeting took place and that the Partnership agreement was concluded. The 1st Respondent failed to call Philippe Estiot, their own employee, the only other person with personal knowledge of the meeting, as a witness. DW4 testified that Philippe Estiot lives in Malaysia and had represented the 1st Respondent in the discussion with the Appellant ... It is reasonable to conclude that Philippe Estiot would have concurred with PW1 and PW2 had he been called ...
>
> On the second point, namely, the *indicia* in finding a partnership, the learned Judge erred in law. Section 4 of the Partnership Act ... provides guidelines to determine the existence of a partnership and is not exhaustive or conclusive.

A The error of the learned Judge in this regard was to apply Section 4(a) to (c) (i) to (v) step by step and thereby conclude there was no partnership. The learned Judge was obliged to make an overall conclusion based on the facts and conduct of the parties and apply the guidelines in that context. In this regard, one has to ascertain if the parties were "in a joint enterprise" (see Lord Millet in *Khan v. Miah* [2001] 1 All ER 20 ... and
B assess their conduct and intention: see *Aw Yong v. Arief Trading* [1992] 1 MLJ 166 ...

The error of the learned Judge was to place undue emphasis on "sharing of profit" which she expected must exist in the usual or traditional sense. The law recognises any participation in the gains or profits of a successful
C business in whatever form ...

RCSA's And RCM's Arguments

[16] The respondents argued that this appeal involved a simple case of an alleged breach of a distributorship agreement. The argument that it involved
D a *de facto* partnership agreed to orally was an afterthought that was raised for the first time in the statement of claim and not borne out by the contemporaneous documents. Reference was made to Article XVII of the Distributorship Agreement which provided for renewal "for consecutive periods of one year, subject to approval of Royal Canin S.A. and acceptance of minimum sales target for the year to come by both parties". There were
E thus two conditions which had to be fulfilled – (a) approval by RCSA and (b) acceptance of minimum sales target for the subsequent year by both parties. DW4 (Francois Gergaud), the President of the Asia Pacific Region of RCSA, testified that RCSA had the authority not to renew the distributorship by notice sent in October 2011, since NPP had not performed
F as expected. There were complaints from customers of stocks not being delivered and NP had failed to meet sales targets. DW4 strongly denied there was any oral partnership agreed, and doubted the suggestion that Philippe Estiot or Luc Cuinet agreed to it since these persons were, at the material times, mere local representatives of the Company who had no authority to
G decide for the company. The conduct of NPP as evidenced by contemporaneous documentary evidence also showed that NPP accepted the relationship as one of distributorship. In his testimony, DW4, when questioned on the alleged oral agreement entered into in 2008, said:

Q: The plaintiff is now alleging that Luc Cuinet had previously verbally
H assured Mr. Shanmuganathan of the plaintiff that it would not be necessary to have a formal renewal of the distributorship agreement. What do you have to say about this?

A: That is not true at all. Luc Cuinet had never reported to or informed me that he had given such verbal assurance to the plaintiff. Had he
I done so, he surely would have informed me. He is also not authorised to give such representations on behalf of the 1st defendant.

Q: The plaintiff is now alleging that in a meeting held sometime in January 2008 attended by Philippe Estiot as the 1st defendant's local representative, it was orally agreed that from 1.1.2008, the plaintiff and the 1st defendant would carry on business by entering into a partnership. Do you agree with this?

A: Absolutely not. The 1st Defendant had never entered into any partnership with the Plaintiff. Philippe Estiot had never reported to or informed me of such partnership. In fact, I have had several discussions with the plaintiff's representative, Mr. Shanmuganathan since 2009 and never once has the plaintiff's representative raised this issue of an alleged partnership with the 1st defendant with me before.

[17] As for the contemporaneous documents, RCSA referred to letters from NPP and NPP's solicitors dated 4 January 2012 and 8 February 2012 respectively, and the minutes of four meetings held between the parties in 2011 in which there was no mention whatsoever about any oral partnership.

[18] The 4 January 2012 letter from NPP stated:

We refer to the above matter, your letter dated 21.10.2011 and the Contract of Distributorship dated 15.5.2003 ("the said Contract") which we received with thanks.

2. We wish to state that both Network Pet Products Sdn Bhd ("the Distributor") and Royal Canin S.A. ("Royal Canin") have continuing obligations under the said Contract.

3. Pursuant to Article XVII, the said Contract was renewed consecutively on a yearly basis. The Distributor was also awarded bonuses by Royal Canin each year since the commencement of the said contract based on the Distributor's yearly performance where annual sales have always been on the increase. This is indicative of the Distributor's goodwill in promoting and marketing the Royal Canin brand within the country.

4. Based on the aforesaid and acting on assurances given by Royal Canin, the Distributor has established the business of trading in Royal Canin, the Distributor has established the business of trading in Royal Canin pet products in Malaysia since the year 1996. To date, Network Pet Products Sdn Bhd remains the sole distributor of Royal Canin products in Malaysia.

5. For these reasons, we dispute Royal Canin's entitlement to terminate the said Contract. Our reasons are fortified by the fact that the Distributor has not breached any of the terms and conditions of the said Contract to warrant such termination.

6. We look forward to a continuing business relationship with Royal Canin. In the interim, the Distributor reserves all its rights.

[19] NPP's solicitor's letter of 8 February 2012 likewise referred to a "distributorship", stating:

The Contract of Distributorship ... was valid for 2 years.

> We are instructed by our client to state that from 1.1.2005, our client was made to understand by the various assurances given by your client that our client will continue to be the sole distributor for your client's products.
>
> We therefore deny that your client has the right to resile from the various assurances given by your client ...

[20] As pleaded, it was purportedly agreed that the parties would continue to carry on business "where the plaintiff will be the sole and exclusive distributor of the products in Malaysia and Brunei for so long as the plaintiff is able and willing to, for the common benefit of the plaintiff and the first defendant and with a view to profit" (para. [19], statement of claim). On this basis, RCSA submitted that the alleged oral partnership, if it existed, would be uncertain and void for uncertainty under s. 30 of the Contracts Act 1950: "Agreements, the meaning of which is not certain, or capable of being made certain, are void". Despite contending that it was an oral partnership without any documentary proof, in its pleadings NPP was able to aver 15 express terms and conditions of the alleged partnership!

[21] In terms of NPP's conduct which showed the allegation of the oral partnership being "a pure concoction and an afterthought", RCSA's written submission reads thus:

> ... subsequent to the issuance of the Notice of Non-Renewal, the appellant had also attended several meetings with the 1st respondent to discuss about the transitional period after the non-renewal of the Contract which clearly shows that the appellant had acknowledged by its conduct that the distributorship under the Contract would end on 31.7.2012 as provided in the Notice of Renewal.
>
> Furthermore, the appellant did not act in a manner which is consistent with the existence of the Oral Partnership Agreement. The appellant appeared to have accepted the non-renewal/termination of the Contract when it discussed with the appellant on the transition of the business and in fact come June 2012, the appellant actually cancelled orders on the basis that it will not be a distributor of the Products post 31.7.2012.
>
> This fact is evidenced in the email dated 11.6.2012 from the appellant, *vide* PW2 to the 1st respondent ... This shows that the appellant has no longer any intention to supply the Products after 31.7.2012. Otherwise the appellant would not have cancelled one of the orders ...

[22] RCSA further argued that even if the oral contract was deemed to exist and was not void for uncertainty, since no fixed period was agreed it was still terminable by a reasonable period of notice. The following cases were cited to show that a nine months' notice period was reasonable in the circumstances: *Sykt Jaya v. Star Publications (M) Bhd* [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151 (six months' notice for 15 years of business relationship); *Kimbokaya Sdn Bhd v. Junior Apparel Enterprise Sdn Bhd* [2011] 1 LNS 1463 (two months' notice for four years); *Merbok Hilir Bhd v. Sheikh Khaled Jassem Mohammad Jassem Al-Thani & Other Appeals* [2013] 8 CLJ 309; [2013] 5 MLJ 407 (six months' notice for eight ½ years).

[23] As for the point on the shifting of the evidential burden and the drawing of adverse inference against NPP under s. 114(g) of the Evidence Act 1950 for failing to call Philippe Estiot and Luc Cuinet, RCSA argued the High Court was correct in its conclusion since both persons had left the employment of RCSA at the material time, ie, when the trial commenced.

[24] On the tort of conspiracy and interference with contract, the viability of this argument was submitted as being contingent on whether NPP was successful in proving the existence of the alleged oral partnership. We quote the relevant passage in the written submission of RCSA for emphasis:

> The Appellant's claim in conspiracy and tort of interference is contingent upon the success of the Appellant in establishing the Oral Partnership Agreement. If the Appellant is unable to establish the Oral Partnership Agreement, the claim in conspiracy and interference with contract will fail.
>
> There is no unlawfulness act and neither is there any unlawful purpose being carried out by the Respondent to sustain a tort of conspiracy.
>
> In any event, the Appellant has also failed to prove any special damages (which must be specifically pleaded) for the tort of interference with contract ... the list of items listed is merely evidence of the properties of the Appellant and are not losses. In fact, the warehouse listed ... was purchased in 7.4.2000 which was before the Respondent had even entered into the Contract with the Appellant. As for the warehouse listed in item (5), it was a rented warehouse of which the tenancy had expired on 30.9.2012 ...

Evaluation

[25] In evaluating the merits of this appeal, we found that this appeal essentially concerned a simple issue of whether there was an oral partnership agreement on the facts, seen against the requirements of a partnership under our partnership law. This was the linchpin of NPP's argument as the appellant in this appeal. If it did not succeed in proving this oral partnership, the main appeal must fall. As for the evidence advanced by NPP, it centred on the oral testimony of two principal witnesses – Shanmuganathan ("PW1") and Vanitha ("PW2"). PW2's evidence was equivocal. In the final analysis, the High Court had to assess the credibility of PW1's evidence. The High Court found his testimony to be contradictory and unsupported by the contemporaneous documentary evidence. It is a proposition too commonplace to set out in great detail that an appellate court should be slow to interfere with findings of facts by a trial court unless the trial court was clearly wrong. The High Court had observed in this case how PW1's evidence was unreliable. We quote the relevant passage in the judgment of the High Court below:

> PW1 is the founder of the Plaintiff's company. However PW1 gave inconsistent evidence in particular with regard to whom from the 1st defendant had entered into the alleged partnership. PW1 had testified in cross-examination that it was not Estiot but Luc Cuinet. In his Witness Statement he said it was Estiot ...

In cross-examination when he was asked whether Luc Cuinet made the Oral Partnership Agreement with him PW1 answered,

> I was always told by him that we were partners ... all along.

He had also given evidence that it was not only Luc Cuinet who had indicated to him of the existence of a partnership but also others whom he met at seminars.

In his Witness Statement PW1 had also stated that the partnership materialized in 2008 but during cross-examination PW1 could not confirm when the partnership was actually formalized and even stated that it existed in 1996 based on various assurances given,

> Q: When did the oral partnership come into effect?
>
> A: All the while ... in 1996.

[26] It is also an accepted proposition in law that in assessing whether a partnership exists, the court has to consider the intention of the parties, and in the absence of a written agreement, reliance has to be placed on the provisions of the Partnership Act 1961: *Martin Mairin Idang v. Rakanan Jaya Sdn Bhd & Anor* [2011] 1 LNS 535; *Chua Ka Seng v. Boonchai Sompolpong* [1993] 1 SLR 482 (a Singapore decision, referred to in *Martin Mairin Idang*, *supra*). The sharing of profits, in the context of a partnership, is a very relevant *indicia*, and this is recognised in s. 4 of the Partnership Act 1961. The decision of this court in *SBS Exporters Sdn Bhd & Anor v. Tampin Rubber Furniture Industry Sdn Bhd & Ors* [2011] 10 CLJ 689, that recognised the importance of this *indicia*, was cited before us to buttress this point. The observations by this court in *SBS Exporters Sdn Bhd*, *supra*, remain very relevant on the facts of this instant appeal:

> Although initially the business relationship between the plaintiffs and the 1st defendant was very close, this did not amount to a partnership (not even a loose partnership) between them for the following reasons:
>
> (a) No attempt was made to register the business as a partnership with the registry of businesses.
>
> (b) The accounts of the plaintiff and the 1st defendant were prepared and kept separately and were not shown to each other.
>
> (c) There was no agreement or provision for any sharing of profits by the plaintiffs in the 1st defendant and *vice versa* ... (at pp. 695-696 of the Report).

[27] Further, we recognised the relevance of art. XV of the Distributorship Contract which provided:

> The present contract cancels and replaces all previous documents or agreements exchanged or concluded by the parties as well as the general conditions of sale and purchases respectively. All changes to the present contract must be in writing.

[28] It was evident that the attempt to prop up an oral partnership agreement flew in the face of this clear provision which constituted an "entire agreement" clause (*Macronet Sdn Bhd v. RHB Bank Berhad* [2002] 4 CLJ 729; [2002] 3 MLJ 11).

[29] As for the argument on conspiracy and interference with contract, we had no issues on the correctness of the law as advanced by counsel for NPP who cited *Kuwait Oil Tanker Co SAK v. Al Bader* [2000] 2 All ER (Comm) 271, *Nagase Singapore Pte Ltd v. Ching Kai Huat and Others* [2008] 1 SLR 80, *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2006] 2 CLJ 358, and *Renault SA v. Inokom Corporation Sdn Bhd & Anor* [2010] 5 CLJ 32, and the dual classification of conspiracy into (a) conspiracy to do an unlawful act and (b) conspiracy to do a lawful act by unlawful means. The facts of this appeal would fall within the second category where it is important to prove that the "predominant purpose" was to injure NPP and injury was thereby caused. On the facts, it could not be said there was such a "predominant purpose". The non-renewal of the distributorship was within the discretion of RCSA and reasonable notice was given. On the question of what would be a reasonable notice period, much depends on the precise facts of the particular case. NPP was given a period of nine months. In our view, this would be reasonable in the circumstances, since the concern of NPP appeared in part to be the expenditure incurred in renting the warehouse in Puchong, but as the evidence indicated, this lease had expired on 30 September 2012.

[30] In any event, once NPP failed to substantiate the existence of the alleged oral agreement of partnership, the claims for conspiracy and unlawful interference with contract consequentially could not stand.

[31] On the question of shifting of the evidential burden and the drawing of an adverse inference against NPP as concluded by the High Court, however, we could not agree with the trial judge, but nevertheless, this was not such a fundamental error that must be held to have wholly vitiated the High Court's judgment, since the penultimate burden of proof on the standard of balance of probabilities lay with NPP to prove the existence of the alleged oral partnership agreement. Section 114 (g) of the Evidence Act 1950 relates to a mere presumption of fact "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". There must be evidence of a conscious "withholding" of that evidence, and so on the factual matrix of this appeal this condition cannot be said to have been satisfied since Philippe Estiot and Luc Cuinet were at the material times employees of RCSA. By the same token, when the case came to be heard, they had ceased being employees of RCSA and there was evidence that RCSA tried to call Philippe Estiot as a witness, and asked for time to do so, which the court refused. On this basis, an adverse inference could not also be drawn against RCSA. Ultimately, a resolution of the issue had to lie with the question on whom the penultimate burden lay under s. 101 of the Evidence Act. NPP had failed simply to discharge this burden.

[32] Finally, we were not convinced that the essential ingredients of the tort of passing off had been established by RCSA and RCM as pleaded in the counterclaim. This was an alleged passing off of the "Royal Canin" mark in a Facebook page established by NPP. The evidence did not support any inference that the mark was being used to represent the mark as that of NPP to create confusion in the market, and RCSA had failed to adduce any evidence on the probability of damage to their goodwill and reputation. The identification of the mark was throughout with RCSA. RCSA even knew of the Facebook page and took some time to protest. This, we felt, was sufficient evidence of an acquiescence on RCSA's part. Indeed, by the time the High Court delivered its decision, the Facebook had been deactivated. In these circumstances, we were of the unanimous opinion that this part of the appeal should be allowed. The relevant paragraphs in the judgment of the High Court pertaining to the counterclaim are (b), (c) and (d).

Conclusion And Orders

[33] In conclusion therefore, we allowed the appeal in part by affirming para. [9](a) of the judgment of the High Court dated 3 June 2013, but set aside paras. (b), (c) and (d).

[34] Costs of RM40,000 here and below were ordered to be paid by NPP as appellant to RCSA and RCM as respondents.